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In the

Supreme Court of the United States

October Term, 1995

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK,
Petitioners,

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; and ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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37 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a state constitutional provision declaring English the official language of the state and requiring English to be used to perform government business violates the Free Speech Clause of the First Amendment.

2. Whether a government employee has a free speech right to disregard the official language of her employer and choose the language in which to perform government business.

3. Do petitioners have standing to maintain this action?*

4. Is there a case or controversy with respect to respondent Yniguez?*

* Pursuant to Order of the Court, March 25, 1996.

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned

citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases concerning First Amendment issues. For example, PLF participated as amicus curiae in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. ____, 115 S. Ct. 2510 (1995), and PLF attorneys, representing petitioners, argued successfully before this Court in *Keller v. State Bar of California*, 496 U.S. 1 (1990).

Amicus seeks to augment the argument in the petitioners' brief. PLF believes that its public policy perspective and litigation experience dealing with the First Amendment will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Rule 37.3, written permission from all parties for PLF to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

This case comes to this Court from a 6-5 *en banc* decision rendered by the Ninth Circuit Court of Appeals, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (*Yniguez III*), which declared that an article of the Constitution of the State of Arizona violated the First Amendment rights of a state employee, Maria-Kelley Yniguez. The Article, entitled "English as the Official Language," requires that "[t]his State and all political

subdivisions of this State shall act in English and in no other language." Arizona Const., Art. XXVIII, § 3(1)(a).

Ms. Yniguez is fluent in both Spanish and English. In 1988, after passage of the initiative making Article XXVIII a part of the state constitution, she ceased using Spanish in the course of her job with the Arizona Department of Administration, where she was hired to process insurance claims against the state. Previously, Ms. Yniguez had spoken in Spanish to the Spanish-speaking members of the public with whom she dealt. *Yniguez III*, 69 F.3d at 924.

Ms. Yniguez brought this present action in federal District Court in November of 1988 against the State of Arizona, then-Governor Mofford, the Arizona Attorney General, and the Director of the Department of Administration, alleging a violation of her right to free speech under the First Amendment to the Constitution of the United States. *Yniguez III*, 69 F.3d at 925. At no time had defendants sought enforcement of Article XXVIII against Ms. Yniguez; rather, Ms. Yniguez sought declaratory and injunctive relief on the basis that Article XXVIII was facially overbroad. *Id.*

On jurisdictional grounds, all defendants to the action were dismissed except for Governor Mofford. *Id.* After plaintiff prevailed, Arizonans for Official English (AOE), the organization which was the principal sponsor of the initiative which created Article XXVIII, *id.* at 926, sought to intervene as defendants and appellants when Governor Mofford chose not to appeal. *Id.* at 925. Although the District Court originally denied the motion of AOE to intervene, the Ninth Circuit, in *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991) (*Yniguez I*), reversed the District Court and found that AOE had standing to intervene under both Federal Rule of Civil Procedure 24(a)(2), and Article III. Additionally, Arizona's

Attorney General, who had been denied intervention on the basis that he could not be reinstated as a party, was allowed to intervene at the Ninth Circuit for the limited purpose of arguing the constitutionality of Article XXVIII. *Yniguez III*, 69 F.3d at 926.

Because Ms. Yniguez had resigned her position with the Arizona Department of Administration in 1990, the State of Arizona filed a "suggestion of mootness." *Yniguez III*, 69 F.3d at 926. However, the Ninth Circuit, in *Yniguez v. Arizona*, 975 F.2d 646 (9th Cir. 1992) (*Yniguez II*), rejected the mootness suggestion, stating that Yniguez had the right to appeal the District Court's denial of nominal damages. *Yniguez III*, 69 F.3d at 926. Despite the fact that the interpretation of Article XXVIII had not been ascertained by a controlling state appellate court, both the District Court and the Ninth Circuit denied defendants' motions for abstention and certification to Arizona state court on the premise that the Article was "not susceptible of a narrowing construction" distinct from the federal court's interpretation. *Id.*

Finding no bar to its exercise of jurisdiction, the Ninth Circuit in *Yniguez III* upheld the District Court's opinion that Article XXVIII violated the First Amendment. It determined that plaintiff's decision to speak Spanish, in the context of conveying information from the state to the public, constituted speech of "public concern" entitled to First Amendment protection. *Id.* at 940. The Ninth Circuit also found that Arizona's countervailing interest in "protecting democracy by encouraging 'unity and political stability;' [and] encouraging a common language," *id.* at 944, were not sufficiently important, nor sufficiently served by the Article's implementation, to outweigh plaintiff's First Amendment rights.

SUMMARY OF ARGUMENT

Article XXVIII of the Arizona Constitution imposes an English-only restriction upon Arizona State employees. In 1988, respondent Yniguez, then a state employee, sued state officials, contending that Article XXVIII violated her First Amendment rights.

Arizona's former governor, the defendant at the trial court, declined to defend the constitutionality of Article XXVIII, a voter initiative. Consequently, petitioners AOE and Robert D. Parks intervened and are now the only parties seeking review of the lower court decisions. *Yniguez III*, 69 F.3d at 926. Under *Diamond v. Charles*, 476 U.S. 54 (1986), petitioners must establish their right to intervene under Federal Rule of Civil Procedure 24(a)(2) and their standing under Article III in order to pursue the appeal. *Id.* at 69. As the principal sponsor of the initiative, *Yniguez III*, 69 F.3d at 926, AOE has a significant tie to the subject matter of the litigation. Further, its interests in preserving Article XXVIII and the effectiveness of the initiative process in general cannot be protected in the absence of intervention. These same factors support the conclusion that AOE meets the requirements of Article III standing. Under the facts of this case, given the state's official indifference to its own constitutional provision, AOE is the only party that can ensure the presence of a live case or controversy and has standing to pursue this appeal.

Because respondent Yniguez no longer works for the State of Arizona, and is therefore no longer subject to Article XXVIII's language restriction, *Yniguez II*, 975 F.2d at 647, her interest should be deemed moot. Although she ostensibly has a claim to nominal damages, her claim should

be discounted because it was essentially created by the Ninth Circuit as a basis for saving Ms. Yniguez from dismissal. *Yniguez II*, 975 F.2d at 647 n.2. Because Article III standing is a prerequisite to retaining federal court jurisdiction, *Warth v. Seldin*, 422 U.S. 490, 498 (1975), she is also foreclosed from asserting third party standing to pursue the case on behalf of other parties not before the Court. *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 955 (1984).

The Ninth Circuit incorrectly concluded that plaintiff's desire to speak Spanish to members of the public while engaged as a state employee in the conduct of state business is a speech interest entitled to First Amendment protection. This Court has qualified public employee free speech rights with three requirements: that the speech be made by the employee as a citizen; that the speech address a matter of public concern; and that the employee's free speech rights outweigh the state's countervailing interest in applying its policy. *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 568 (1968). Although the Ninth Circuit attempted to leverage respondent's arguments into established precedents, this case is not analogous to employee speech cases previously addressed by this Court. First, Article XXVIII does not impact employees when they are speaking "as a citizen" since, by its terms, it applies only to "state employees during the performance of government business." Art. XXVIII, § 1(3)(a)(iv). Second, because the state may validly regulate speech when the state itself is the speaker, *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. at 2518, the speech regulated by Article XXVIII is not speech of "public concern" entitled to First Amendment protection. Third,

because no First Amendment interests of state employees are infringed by Article XXVIII, asserted state interests in promoting a common language outweigh any employee interests.

ARGUMENT

I

PETITIONERS HAVE STANDING TO MAINTAIN THIS ACTION

A. Petitioners Meet the Requirements of Federal Rule of Civil Procedure 24(a)(2) and Article III

The unusual route by which petitioners[1] have sought review has prompted this Court to seek briefing on the question of whether petitioners have standing to maintain this action. The Ninth Circuit specifically addressed this question in *Yniguez I* and found that petitioners have standing to pursue its appeal. *Yniguez I*, 939 F.2d at 731-38.

As a preliminary matter, this Court has previously found that intervenors, so long as they have "a sufficient stake in the outcome of the controversy," have standing to appeal an adverse decision on their own behalf. *Bryant v. Yellen*, 447 U.S. 352, 368 (1980); *see also Diamond*, 476 U.S. 54; *Maine v. Taylor*, 477 U.S. 131 (1986).

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[1] Petitioners are AOE and Robert D. Park, the head of AOE. Because AOE, by itself, has standing to maintain this appeal, this brief will not address whether Mr. Park may separately maintain an appeal.

This Court enunciated the standing requirements for an intervenor in petitioner's position in *Diamond*. That case involved a class challenge to Illinois' 1975 Abortion Law. *Id.* at 57. When the named defendants charged with enforcing the law chose not to petition for review, Dr. Diamond, an intervenor in the action, sought review by this Court. *Id.* at 61. This Court held that Dr. Diamond's interest in seeing laws enforced, and his status as a doctor and a father, *id.* at 64-66, were insufficient to confer standing, and therefore dismissed the appeal for lack of jurisdiction. *Id.* at 56. This Court determined that an intervenor must demonstrate that he meets the requirements to intervene as of right under Federal Rule of Civil Procedure 24(a) and the requirements of Article III in order to pursue an appeal. *Id.* at 69.

Unlike the petitioner in *Diamond* who failed to establish standing, the facts in this case make it clear that AOE has standing to maintain this action. The Ninth Circuit correctly concluded that AOE was entitled to intervene as of right, that is, AOE could "claim an interest relating to the property or transaction which is the subject of the action" and that "the disposition of the action [would] as a practical matter impair or impede the applicant's ability to protect that interest." Fed. Rule Civ. Proc. 24(a)(2). *Yniguez I*, 939 F.2d at 731. AOE has a substantial interest in the "transaction" involved in the present litigation, that interest being its close relationship with the existence of Article XXVIII itself. Further, because Arizona state officials refused to defend the law, intervention by AOE was the only available avenue by which the people of Arizona's interest in the validity of the law they enacted could be protected. Clearly, AOE meets the requirements of Federal Rule of Civil Procedure 24(a)(2) such that it is entitled to intervention as of right. *See also Washington State Building and Construction Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir.), *cert.*

denied, 461 U.S. 913 (1982) (public interest group which sponsored initiative was entitled to intervention as of right under Federal Rule of Civil Procedure 24(a)(2)).

Finding that a party is entitled to intervention as of right, alone, however, "does not confer standing sufficient to keep the case alive" unless the party can also meet the requirements of Article III. *Diamond*, 476 U.S. at 68.

> Article III of the Constitution limits the power of federal courts to deciding "cases" or "controversies."
>
> ....
>
> [T]he decision to seek review must be placed "in the hands of those who have a direct stake in the outcome." ... It is not to be placed in the hands of "concerned bystanders," who will use it simply as a "vehicle for the vindication of value interests."

Id. at 61-62 (citations omitted). Unlike Dr. Diamond who defended the Illinois Abortion Law merely as a citizen and physician, AOE has invested its time and effort in drafting Article XXVIII as well as getting it on the ballot and supporting its passage. AOE is more than a "bystander" to the contested legislation. As the Ninth Circuit stated in considering the matter:

> The official sponsors of a ballot initiative have a strong interest in the vitality of a provision of the state constitution which they proposed and for which they vigorously campaigned. The district court's decision striking down Article XXVIII essentially nullified the considerable efforts AOE

> made to have the initiative placed on the ballot and to obtain its passage.

Yniguez I, 939 F.2d at 733.

This Court has previously allowed an intervenor to seek review of a federal court's invalidation of state law. In *Maine*, the State of Maine invoked 28 U.S.C. § 1254(2), which authorized an appeal of right "by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States," in order to defend its state law. *Maine*, 477 U.S. at 133. In that case, an individual sought dismissal in a federal court of a criminal indictment based on Maine law. The District Court denied the dismissal, but the Court of Appeals for the First Circuit reversed. When the United States decided not to appeal, the State of Maine intervened. In upholding Maine's standing to pursue the appeal, this Court stated:

> Maine's stake in the outcome of this litigation is substantial: if the judgment of the Court of Appeals is left undisturbed, the State will be bound by the conclusive adjudication that its import ban is unconstitutional.

Maine, 477 U.S. at 136. Although AOE cannot similarly invoke an appeal of right, the considerations cited above which militated in favor of finding that Maine had Article III standing are relevant here. A federal court has nullified a state constitutional provision. As in *Maine*, because a named defendant in the present litigation has foregone appeal, the party with the greatest stake in the outcome of the litigation will be bound by a decision in which it had no opportunity to participate. AOE is in fact the only party that "ensures the presence of the 'concrete adverseness which sharpens the

presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Diamond*, 476 U.S. at 62 (citation omitted). Under these facts, AOE has established the presence of the case or controversy required to confer Article III standing.

B. Petitioner's Position Is Directly Analogous to "Legislative Standing" Previously Recognized by This Court

In one sense, as the Ninth Circuit opined, AOE's position as sponsor of Article XXVIII is analogous to that of a legislature to legislation. *Yniguez I*, 939 F.2d at 733. This Court early recognized the concept of "legislative standing" in *Coleman v. Miller*, 307 U.S. 433 (1939). In finding that state legislators had standing, this Court held that "these senators [challenging the lower court holding] have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Coleman*, 307 U.S. at 438. Accord, *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974); *Government of Virgin Islands v. Eleventh Legislature of Virgin Islands*, 536 F.2d 34 (3d Cir. 1976); *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1984), *rev'd on mootness grounds*, *Burke v. Barnes*, 479 U.S. 361 (1987); *but see Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975). In addition, in *Karcher v. May*, 484 U.S. 72 (1987), this Court implicitly acknowledged the standing of the New Jersey State Legislature to pursue an appeal in defense of legislation that it had passed.

Karcher involved a statute requiring New Jersey primary and secondary schools to hold a period of silence at the beginning of each school day, which the state legislature passed over the governor's veto. Because the executive department officials chose not to defend the statute, two legislators, Karcher and Orechio, in their official capacities

as Speaker of the General Assembly and President of the Senate, intervened on behalf of the legislature to defend the constitutionality of that law. *Karcher*, 484 U.S. at 75. Although the two legislators in that case later lost their standing by virtue of losing their positions in the New Jersey State Legislature, this Court acknowledged that the legislature itself had standing to intervene to defend the law they had passed where the named defendants, who were executive department officials, declined to defend the statute in question. *Karcher*, 484 U.S. at 81.

As sponsor of the initiative which created Article XXVIII, AOE is in a position similar to that of the petitioners in *Karcher*. Arizona's Governor Mofford, a critic of Article XXVIII and the only defendant at the District Court, similarly chose to forego an appeal. *Yniguez III*, 69 F.3d at 926. As the organization that brought about the enactment of Article XXVIII and the sole party willing to defend the vote of the citizens of Arizona, AOE should be found to have standing to defend the constitutionality of the law it was instrumental in enacting.

C. Denying Petitioner Standing Will Eviscerate the State-Granted Initiative Power

Article IV, Section 1, of the Arizona Constitution reserves to the people of Arizona the power to "propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the Legislature." The law in question is one that the people of Arizona, by initiative, passed. Article XXVIII itself gives "a person who resides in or does business in this State ... standing to bring suit to enforce this Article in a court of record of the State." Art. XXVIII, § 4. While "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a

federal court," *Allen v. Wright*, 468 U.S. 737, 754 (1984), in the absence of some right to standing recognized in the people themselves, the power granted to the people of Arizona in Article IV, Section 1, of the Arizona Constitution will be essentially nullified *unless some governmental branch or official concurs in the law as passed*. This is directly antithetical to the very concept of the initiative power. As the Ninth Circuit pointed out in *Yniguez I*,

> the government may be less than enthusiastic about the enforcement of a measure adopted by ballot initiative; for better or worse, the people generally resort to a ballot initiative precisely because they do not believe that the ordinary processes of representative government are sufficiently sensitive to the popular will with respect to a particular subject.

Id. at 733. Here, of course, the party seeking to defend the law in question is more than merely a random citizen purporting to represent the will of the people, but the association which sponsored the initiative.

Further, the fact that Article XXVIII grants standing to Arizona residents to enforce its provisions also militates in favor of finding Article III standing. In *Karcher*, this Court refused to vacate lower federal court decisions on the basis that the intervenor-defendants in that case lacked standing. This Court held that "[s]ince the New Jersey Legislature had authority *under state law* to represent the States's interest ... we need not vacate the judgments below for lack of a proper defendant-appellant." *Karcher*, 484 U.S. at 82 (emphasis added).

The officials of the State of Arizona who are charged with enforcement of Arizona law have entirely abandoned

any effort to defend the law in question. Denying standing to AOE will have serious implications as to whether initiatives in general can be entirely nullified through the indifference or hostility of a single state official who declines to defend a state law or constitutional amendment enacted by initiative. Standing should be conferred on AOE because its position can be depended upon to fairly and accurately reflect the intent of the people in proposing and passing the law. AOE has a vested interest, as does every private association seeking to utilize the initiative power, not only in "maintaining the effectiveness of their votes," *Coleman*, 307 U.S. 433 at 438, but in maintaining the effectiveness of its members' substantial investment of time and effort.

As was accurately pointed out by the Ninth Circuit when confronted with the procedural complexities before it:

> While the people may not always be able to count on their elected representatives to support fully and fairly a provision enacted by ballot initiative, they can invariably depend on its sponsors to do so.

Yniguez I, 939 F.3d at 733. If AOE is denied standing, enactments passed by initiative are subject to nullification by executive fiat.

II

THERE IS NO CASE OR CONTROVERSY WITH RESPECT TO RESPONDENT YNIGUEZ

A. Ms. Yniguez' Nominal Damages Claim Is Not Sufficient to Confer Standing

As noted above, Article III of the Constitution limits federal court jurisdiction to "cases" or "controversies."

Respondent Yniguez' standing in the present action depends upon whether she can demonstrate that there exists a live case or controversy that has not been mooted. Because Ms. Yniguez voluntarily resigned from her position with the State of Arizona in 1990, *Yniguez III*, 69 F.3d at 926, she is not presently subject to Article XXVIII's requirements. *Yniguez II*, 975 F.3d at 647.

For parties invoking federal court jurisdiction, under this Court's precedents

> the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally-protected interest which is (a) concrete and particularized ... and (b) "actual or imminent, not 'conjectural' or 'hypothetical'" .... Second, there must be a causal connection between the injury and the conduct complained of .... Third, it must be "likely," as opposed to merely "speculative," that the injury "will be redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). At the time Ms. Yniguez instituted this suit, she met these standing requirements: As a state employee, she could allege that Article XXVIII's restrictions created a "chilling effect" on what she characterized as her right to free speech under the First Amendment, and that she could be subject to discipline if she chose to exercise that perceived right. *Yniguez III*, 69 F.3d at 924. Ms. Yniguez' voluntary resignation from state employment negates the presence of any of the necessary elements to confer standing. Moreover, the Ninth Circuit's attempt to confer standing upon

respondent because her constitutional claims might entitle her to an award of nominal damages must fail.

In her complaint, Ms. Yniguez sought an injunction against enforcement of Article XXVIII, as well as declaratory relief that the provision was in violation of the federal Constitution as well as federal civil rights laws. *Yniguez III*, 39 F.3d at 925. Respondent did not specifically seek nominal damages, yet inserted in her complaint a request for "all other relief that the Court deems just and proper under the circumstances." *Yniguez II*, 975 F.3d at 647 n.1.

This Court has held that "as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435, 442 (1984). In addition, this Court has found that a claim for damages still extant, despite the fact that other issues have been mooted, is sufficient to find the existence of a live case or controversy. *Powell v. McCormack*, 395 U.S. 486, 497 (1969) (claim for damages of elected Congressman who had not been seated in 90th Congress saved case from mootness when he was subsequently seated in 91st Congress); *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 8 (1978) (plaintiff's claim for damages saved case from mootness where defendant had ceased allegedly unconstitutional practice); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 n.1 (1989) (expiration of city ordinance did not moot appellee's constitutional challenge to ordinance where appellee could claim damages).

While these cases stand for the proposition that a claim for damages can preserve a case or controversy, here, Ms. Yniguez' claim for nominal damages is insufficient to confer standing. Ms. Yniguez never specifically sought nominal damages, nor appealed the District Court's implicit

denial of any damages, until after the state had suggested that the case be dismissed as moot. *Yniguez II*, 975 F.3d at 647 n.2. In an attempt to salvage Ms. Yniguez' standing, the Ninth Circuit, *sua sponte*, stated that "plaintiff's constitutional claims *may entitle her* to an award of nominal damages." *Id.* at 647 (emphasis added). Essentially, the Ninth Circuit created the existence of the nominal damages issue to save the case from mootness by specifically inviting Ms. Yniguez to raise the issue in some future cross-appeal. *Id.* at 647 n.2. Because Ms. Yniguez never preserved a claim for nominal damages, her claim now should not be allowed as a subterfuge for gaining standing where no valid basis for standing exists.[2]

B. Ms. Yniguez May Not Utilize Third Party Standing to Assert the Rights of Others Not Before the Court

As a general matter, "this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. at 499. The general proscription against granting third-party standing, however, has been abridged in the area of the First Amendment. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). Specifically, the Court has allowed challenges based upon "facial overbreadth" to be pressed by litigants "not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before

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[2] If this Court determines that the Ninth Circuit lacked jurisdiction, amicus respectfully suggests that the decision be vacated. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

the court to refrain from constitutionally protected speech or expression." *Id.* at 612. Further, this Court has allowed a party to bring a facial overbreadth challenge asserting the rights of others

> without regard to the ability of the other to assert his own claims and "'with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'"

Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. at 957 (citations omitted).

In the present case, Ms. Yniguez "brought her suit in a quasi-representational capacity." *Yniguez II*, 975 F.2d at 648. However, Ms. Yniguez is not automatically entitled to continue the suit on behalf of the state employees still subject to Article XXVIII's restrictions simply because her challenge is based on facial overbreadth.

Despite the broad exception to third party standing created in the area of the First Amendment, this Court has not and cannot exercise jurisdiction in the absence of the basic Article III requirement that there exists a live case or controversy: "'*Given a case or controversy*, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.'" *Munson*, 467 U.S. at 953 (emphasis added; citation omitted). This Court has characterized the broadening of standing for the purposes of a First Amendment challenge as a lessening of *prudential limitations*, not a lessening in general of the Article III requirement. *Munson*, 467 U.S. at 956.

Because Ms. Yniguez does not satisfy the "first element of the standing inquiry ... the 'case' or 'controversy' requirement of Art. III," *Munson*, 467 U.S. at 954, Ms. Yniguez may not raise the rights of other parties not before the Court based on an overbreadth challenge.

III

ARTICLE XXVIII DOES NOT VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

Article XXVIII does not purport to ban the use of non-English languages by citizens throughout the State of Arizona. And, contrary to the statement by the Ninth Circuit, it does not even apply to all "persons connected with the government." *Yniguez III*, 69 F.3d at 933. Rather, Article XXVIII's language restrictions apply only to state "officials and employees during the performance of government business." Art. XXVIII, § 1(3)(a)(iv). As such, the applicable First Amendment test, and the test that was applied by the Ninth Circuit in this case, is that applied by this Court pertaining to public employee speech.

This Court enunciated the standards by which government could regulate employee speech in *Pickering*. That case dealt with whether a local school board had violated a teacher's First Amendment rights by discharging him based upon a letter he had sent to a local newspaper. After acknowledging that the state had valid interests in regulating the speech of its employees, this Court announced the relevant test to be applied in determining whether a state employee speech restriction could pass constitutional muster:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen,

> in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering, 391 U.S. at 568. The balancing test defined by *Pickering* has been applied consistently by this Court in public employee speech cases since. *See, for example, Connick v. Myers*, 461 U.S. 138 (1983); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Waters v. Churchill*, 511 U.S. ___, 114 S. Ct. 1878 (1994); *United States v. National Treasury Employees Union*, 513 U.S. ___, 115 S. Ct. 1003 (1995) (*NTEU*). In assessing the speech at issue in this case, relevant considerations are whether: (1) respondent is speaking as a citizen; (2) the speech relates to a matter of public concern; and (3) the state's interest as an employer is outweighed by respondent's interest in engaging in the restricted speech. *Pickering*, 391 U.S. at 568.

A. The Public Employee Speech Doctrine Does Not Apply Where the Employee Does Not Speak as a Citizen

The cases that have come before this Court under the category of public employee speech have uniformly related to restrictions on speech *not* part of the employee's official functions. In *Pickering*, the Court held this distinction to be significant:

> [Where] the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to

> regard the teacher *as the member of the general public he seeks to be*.

Pickering, 391 U.S. at 574 (emphasis added).

Speech restrictions disfavored by this Court have generally involved employee speech outside of an employee's official duties. In *NTEU*, this Court emphasized the importance of the citizen prong of the *Pickering* test: "[W]e have applied Pickering's balancing test only when the employee spoke '*as a citizen* upon matters of public concern.'" *NTEU*, 115 S. Ct. at 1013 (emphasis in original). *NTEU* involved a challenge to a federal law banning honoraria for any "appearance, speech or article" given by a government employee. In finding the ban overbroad, this Court emphasized that the expression at issue

> fall[s] within the protected category of citizen comment on matters of public concern. ... The speeches and articles for which they received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment.

Id. at 1013.

In stark contrast, Article XXVIII's non-English restriction applies only where respondent is *not acting as a citizen*, but instead where she *represents the state*. Indeed, Article XXVIII specifically excludes all of respondent's speech as a citizen and is entirely inapplicable except when she is engaged in "the performance of government business." Art. XXVIII, § 1(3)(a)(iv). As this Court stated in *Waters*, "when an employee counsels her coworkers *to do their job in a way with which the public employer disagrees*, her

managers may tell her to stop." *Waters*, 114 S. Ct. at 1886 (emphasis added). Similarly, the State of Arizona may dictate the way in which Ms. Yniguez must perform her state job.

Paradoxically, in the same section in which the Ninth Circuit majority avers that "the government would ordinarily have the authority to determine the tasks that it asks its employees to perform and to dictate the content of the messages that it wishes its employees to communicate to the public," *Yniguez III*, 69 F.3d at 940, the majority concluded that respondent's speech is *more* entitled to First Amendment protection by virtue of the fact that "here the employee is not simply commenting on a public issue but in speaking *is actually performing his official duties*." *Id.* at 939 (emphasis added). This is in direct conflict with the purpose behind asserting individual protected rights, particularly First Amendment free speech rights: Respondent has no personal stake in the speech she is uttering, and she cannot bootstrap official state speech into personal speech by virtue of the fact that government speech frequently relates to matters of public concern. Just last term, this Court announced:

> [W]hen the State is the speaker, it may make content-based choices .... [W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message .... We recognize[] that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.

Rosenberger, 115 S. Ct. at 2518-19. Because Article XXVIII explicitly excludes speech as a citizen, the Ninth Circuit's conclusion that the language choice banned by

Article XXVIII is entitled to First Amendment protection is erroneous.

B. Speech of "Public Concern" Relates to Content, Not the Mode of Expression

The Ninth Circuit misconstrued the "public concern" prong of the *Pickering* balancing test in arriving at its conclusion that respondent's speech constituted speech of public concern. The court concluded that, because the speech related to "the provision of governmental services and information," and was "speech that members of the public desire to hear," *Yniguez III*, 69 F.3d at 940, it was necessarily of public import. This Court has specifically rejected such a notion: "[T]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark ... would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149. Moreover, the desire of the public to receive information in a language they can understand is factually and conceptually distinct from this Court's prior pronouncements about speech of public concern.

In describing the public concern prong in *Pickering*, this Court stated that the "core value of the Free Speech Clause of the First Amendment" was "the public interest in having free and unhindered debate on matters of public importance." *Pickering*, 391 U.S. at 573. This understanding was reemphasized in subsequent public employee speech cases:

> When employee expression cannot be fairly considered as relating to any matter of *political, social or other concern to the community*, government officials should enjoy wide latitude in managing their offices, without intrusive

> oversight by the judiciary in the name of the First Amendment.

Connick, 461 U.S. at 146 (emphasis added). Further, in explaining the type of speech entitled to First Amendment protection under the public concern prong of *Pickering*, this Court in *Rankin* referred to the principle announced in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), that "debate on public issues should be uninhibited, robust and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Rankin*, 483 U.S. at 387. In contrast, the speech which the Ninth Circuit has deemed of "public concern" has none of the attributes which this Court has deemed entitled to First Amendment protection. Ms. Yniguez processed insurance claims for the state, *Yniguez III*, 69 F.3d at 924; the content of the "speech" at issue is the communication between her and the members of the public with whom she deals; it has no political or social import. Moreover, even if it did, *Article XXVIII would not ban it*.

The Ninth Circuit blurs the distinction between the medium used--the choice of language--and the message sought to be conveyed--meaningful content of the words. In so doing, the opinion effectively obliterates the public concern prong of the *Pickering* test, instead transforming the public concern about the functioning of government into a public "right to receive" information from the government. *Yniguez III*, 69 F.3d at 941.

The Ninth Circuit relied heavily upon *NTEU* for this proposition. Quoting from *NTEU*, the court stated:

> "The large-scale disincentive to government employees' expression also imposes a significant

> burden on the public's right to read and hear what the employees would otherwise have written and said."
>
> ....
>
> Thus, *National Treasury Employees Union* makes it clear that public employee speech doctrine weighs heavily the public's "right to receive information and ideas" by affording First Amendment protection to speech that the public has an interest in receiving.

Yniguez III, 69 F.3d at 942 (citation omitted). But *NTEU* does not declare that the public's desire to hear information elevates that desire, by itself, into an interest entitled to First Amendment protection. Instead, this Court's holding that the ban was overinclusive was based on the finding that Congress had not sufficiently established a nexus between its legitimate interest in avoiding appearances of impropriety, *NTEU*, 115 S. Ct. at 1017, and the fact that the ban reached matters that were *not government related*:

> Because the vast majority of the speech at issue in this case does not involve the subject matter of government employment and takes place outside the workplace, the Government is unable to justify [the ban] on the grounds ... asserted in *Pickering* ....

Id. In other words, the ban in *NTEU* went too far because it went beyond the government's legitimate interest in the functioning of the government itself: "[O]ne can envision scant harm, or appearance of harm, resulting from [a government] employee's accepting pay to lecture on the Quaker religion or to write dance reviews." *Id.* In fact,

NTEU implied that, had the ban applied to the subject of government employment or the government workplace (as it does in the present case), it would have been upheld regardless of the public's desire to hear the speech at issue.

Because the public's desire to hear speech does not elevate government employee speech to a category of protected speech, the Ninth Circuit was incorrect in concluding that respondent's speech satisfied the public concern prong of the public employee speech doctrine. Unless this Court holds that choice of language, as *sui generis*, is entitled to First Amendment protection, the Ninth Circuit's decision must be reversed.

C. Arizona's Interest in Unity and Political Stability Is Entitled to Deference by the Federal Judiciary

Under the *Pickering* test, this Court has traditionally balanced the interests of the public employee in expressing his or her own views against the state's interest in "the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The state interest asserted in the present case is not efficiency, but rather "protecting democracy by encouraging 'unity and political stability'; encouraging a common language; and protecting public confidence." *Yniguez III*, 69 F.3d. at 944.

While ostensibly giving credence to the state's asserted interest, the Ninth Circuit ultimately concluded "[w]e cannot agree that Article XXVIII is in any way a fair, effective, or appropriate means of promoting [the state's] interests." *Yniguez III*, 69 F.3d at 946. Unfortunately, its conclusion ultimately dealt less with the weight of the asserted state interest than in passing its own judgment upon whether the state's interests were desirable and whether the means chosen

by the state were the best for serving those interests. In so doing, the Ninth Circuit applied an improper test.

In support of its holding, the Ninth Circuit cited *Meyer v. Nebraska*, 262 U.S. 390 (1923), in which this Court struck a state law which banned foreign language instruction in private schools. The error in the Ninth Circuit's analysis stems from the fact that *Meyer* dealt with a substantive due process challenge, and not a First Amendment challenge. In striking the foreign language instruction ban in *Meyer*, the Court did not say that the state's goal of "foster[ing] a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters" was unimportant or unworthy, only that the state law banning foreign language instruction in private schools to further the state's interest could not withstand due process as applied. *Meyer*, 262 U.S. at 402-03. In other words, the Court applied the classic due process test: Whether the means chosen by the state to promote a state interest were legitimate or arbitrary. Under the public employee doctrine of the First Amendment, however, the proper test is not whether the judiciary favors the means chosen by the state to promote its goal, but whether the state's interest in promoting its goal is outweighed by the employees' First Amendment interest in commenting on matters of public concern. *Pickering*, 391 U.S. at 568.

In fact, contrary to the Ninth Circuit's reading, the *Meyer* Court indicated that the due process considerations which prompted it to strike the ban on private conduct would *not* apply in the context of state conduct:

> The power of the state to ... make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge

> been made of the state's power *to prescribe a curriculum for institutions which it supports.*

Meyer, 262 U.S. at 402 (emphasis added). The *Meyer* Court acknowledged that the state had wide latitude to regulate its own conduct with respect to choosing a means to further its goals.

The Ninth Circuit misapplied the state interest prong of the *Pickering* balancing test, treating respondent's First Amendment challenge under the public employee speech doctrine as a due process challenge. Furthermore, the Ninth Circuit's due process conclusion that Article XXVIII is an inappropriate means to serve the asserted state interest was unwarranted, because the precedent it cited related to government regulation of private conduct, rather than regulation of its government affairs. The State of Arizona is seeking only to regulate the conduct of state employees funded entirely by state tax revenues and in the performance of state business; federal courts should defer to the judgment of Arizona to determine what is in that state's interests. The Ninth Circuit's failure to give due weight to the state's interest in promoting unity and political stability should be rebuffed by this Court.

CONCLUSION

Article XXVIII of the Arizona Constitution restricts the use of non-English languages by state "officials and employees during the performance of government business." Art. XXVIII, § 1(3)(a)(iv). The Ninth Circuit Court of Appeals held that the foreign language ban imposed by Article XXVIII violates the Free Speech Clause of the First Amendment to the United States Constitution.

Article XXVIII relates only to public employee speech. Despite the broad protections afforded to speech by the Constitution, this Court has recognized that the government, as an employer, may properly "regulate the content of what is or is not expressed when it is the speaker." *Rosenberger*, 115 S. Ct. at 2518. Because Article XXVIII of the Arizona Constitution applies only to government speech, and because its ban applies merely to choice of language, it in no way infringes the core First Amendment "interest in having free and unhindered debate on matters of public importance." *Pickering*, 391 U.S at 573. Consequently, this Court should reverse the Ninth Circuit decision.

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